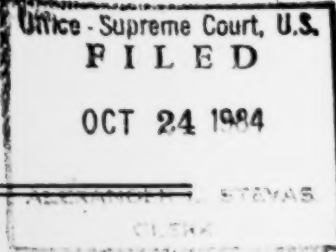


84-661



No. _____

In The
Supreme Court of the United States
October Term, 1984

HOWARD VIRGIL LEE DOUGLAS,
Petitioner,
vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
and DAVID H. BRIERTON,
Superintendent of Florida State Prison,
Respondents.

On Cross-Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

ELLIOTT C. METCALFE, JR.
LARRY HELM SPALDING
STEVEN M. GOLDSTEIN
Office of the Public Defender
2070 Main Street
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QUESTION PRESENTED

WHETHER A CRIMINAL TRIAL MAY BE CLOSED TO THE GENERAL PUBLIC UPON THE REQUEST OF THE PROSECUTION OVER A DEFENDANT'S OBJECTIONS WITHOUT ANY DEMONSTRATION THAT CLOSURE WAS NECESSITATED BY SOME OVERRIDING GOVERNMENTAL INTEREST.

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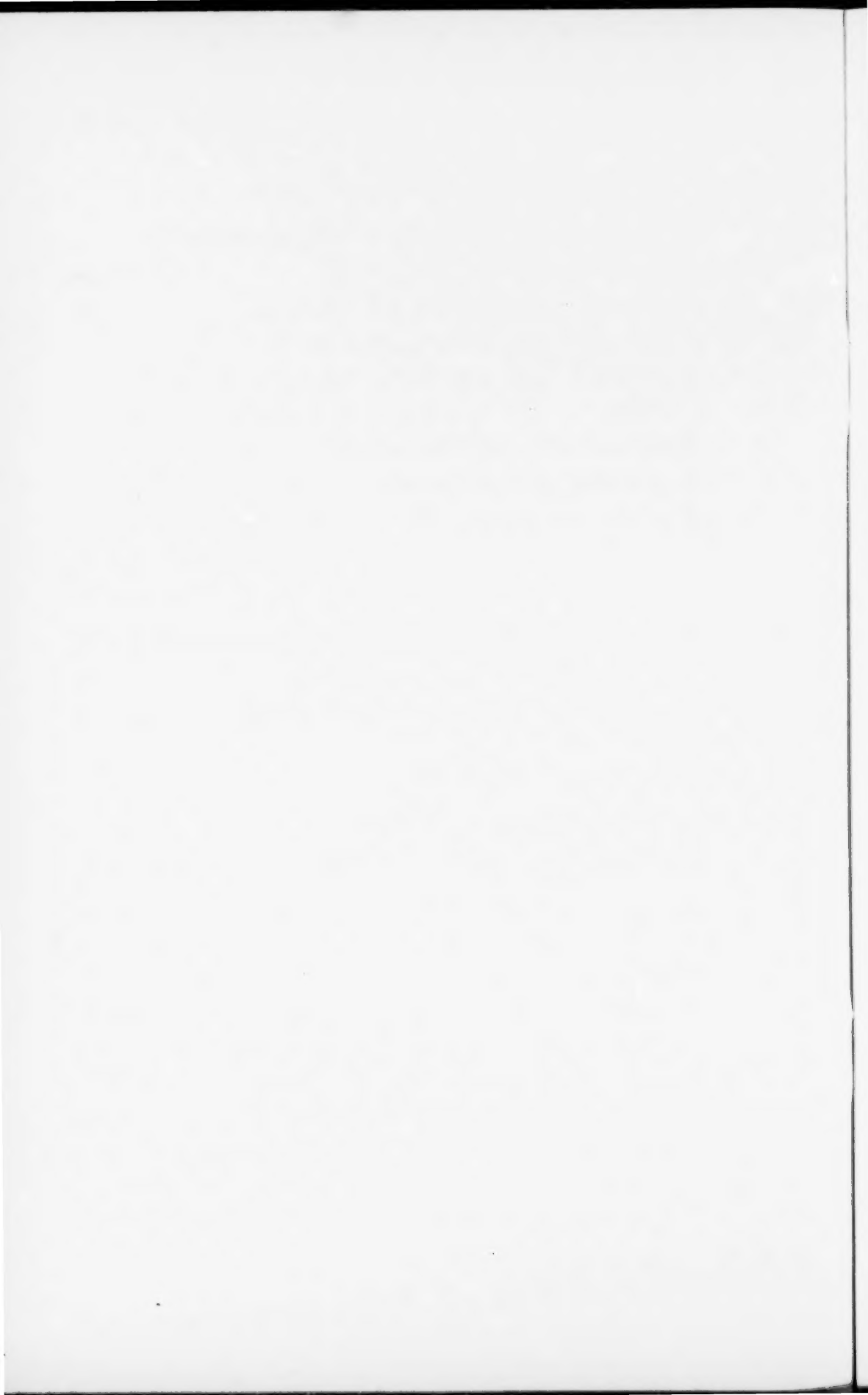
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No.

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**On Cross-Petition for a Writ of Certiorari to the
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BRIEF OF PETITIONER ON JURISDICTION

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984). A-1-6. That decision reinstated the panel opinion in *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983) after this Court granted the petitions for certiorari

and remanded for further consideration in light of *Waller v. Georgia*, 467 U.S. —, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) and *Strickland v. Washington*, 466 U.S. —, 104 S.Ct. 2952, 80 L.Ed.2d 674 (1984). *Douglas v. Wainwright*, — U.S. —, 104 S.Ct. 3575, — L.Ed.2d —. The original opinion of the United States Court of Appeals reviewed the judgment of the district court reported at *Douglas v. Wainwright*, 521 F.Supp. 790 (M.D. Fla. 1981). Opinions of the Supreme Court of Florida are reported at *Douglas v. State*, 328 So.2d 18 (Fla. 1976), *cert. den.* 429 U.S. 871 (1976) and *Douglas v. State*, 373 So.2d 895 (Fla. 1979).

II.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit by a two-to-one decision, on August 1, 1984, on remand from this Court, reinstated the prior panel opinion of September 19, 1983, appearing at *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983) and issued its judgment in the cause as mandate that date. On August 7, 1984, the state filed a motion to recall mandate in order to file a timely petition for writ of certiorari in this Court. On August 30, the United States Court of Appeal entered an order recalling the mandate until October 1, 1984, to allow for a timely petition for certiorari.

On September 28, 1984, a copy of the state's petition for writ of certiorari to the Eleventh Circuit Court of Appeals was received by cross-petitioner.

The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. Sec. 1254.

III.

**CONSTITUTIONAL AND
STATUTORY PROVISIONS**

Amendment VI of the Constitution of the United States provides that:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for this defense.”

Amendment XIV of the Constitution of the United States provides *inter alia*, that:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”

Title 28 U.S.C. Sec. 2254(a) provides that:

“The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

IV.**STATEMENT OF THE CASE**

The pertinent facts material to consideration of the question presented are identical to those appearing in our first cross-petition in Case No. 83-995 and will not be needlessly repeated. This Court on July 5, 1984, granted the State's petition in Case No. 83-817 for a writ of certiorari, vacated the judgment of the Court of Appeals on the ineffective assistance of counsel issue and remanded the cause for further consideration in light of *Strickland v. Washington*, 466 U.S. —, (1984). This Court also granted our petition in Case No. 83-995, vacated the judgment of the Court of Appeals on the public trial issue and remanded for further consideration in light of *Waller v. Georgia*, 467 U.S. —, (1984).

On remand, the Court of Appeals, on August 1, 1984, reaffirmed its judgment on both issues and reinstated the original panel opinion. A-1-6.

V.**BASIS OF FEDERAL JURISDICTION**

The basis of federal jurisdiction in the Court of first instance was a petition for writ of habeas corpus filed pursuant to Title 28 U.S.C. Sec. 2254.

VI.**REASONS FOR GRANTING THE WRIT**

The question presented by this petition necessitates the attention of this Court in order to ensure that rights

guaranteed by the Sixth and Fourteenth Amendments to the Constitution are not compromised by the failure to comply with the principles of law articulated in *In re Oliver*, 333 U.S. 257 (1948), *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), *Press-Enterprise Co. v. Superior Court*, 464 U.S. —, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), and *Waller v. Georgia*, 467 U.S. —, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

The right to a public trial is one of the most cherished liberties guaranteed us by the Bill of Rights. To take that right from a man facing the ultimate penalty—death—strikes at the very heart of the awesome responsibility citizens repose in our government.

At the heart of the purpose of public trial is that “[o]penness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously . . .” *Gannett Co. v. DePasquale*, *supra* at 383.

More recently this Court expressed that “in *criminal trials* in particular” there is a presumption of openness from back to “the time when our organic laws were adopted . . . both here and in England.” *Globe Newspaper Co. v. Superior Court*, *supra*.

This case presents three questions: First, there is a need to make clear under what circumstances a trial can be closed over the objection of the accused when one witness is testifying at the actual testimonial stage of the proceeding to determine guilt or innocence and punishment of

life or death. Second, there is a need to make clear how the public trial guarantee is to be applied when only a limited segment or class of persons are allowed to remain instead of total closure. Third, there is a need to set out the specific reasons which would justify a trial being closed over the accused's objection. Is protection of the witness from unnecessary insult to her dignity a valid reason to close a portion of the trial?

From these questions it is obvious that when analyzed in the context of the opinion of the lower court with this Court's unbroken view to open trials that if the lower court's opinion is allowed to stand public trials will be a thing of the past. The exclusion herein surrounded the "sole eyewitness to the murder and the witness on whose testimony the judge relied on in finding the one aggravating circumstance used to justify imposition of the death penalty." *Douglas v. Wainwright*, 714 F.2d 1532 at 1541. "[H]er testimony was crucial to say the least." *Id.*

The Court of Appeals mistakenly compares the length of exclusion in *Waller* at a pre-trial suppression hearing with the fact that closure here only surrounded one witness during trial to justify the exclusion. Clearly, the dangers of closure during the testimony of the sole eyewitness is of greater impact than testimony during a pre-trial suppression hearing. What impressions were left with the jurors from partial closure in this case? Did they believe that this testimony deserved special protection, or undue emphasis, or more credibility than other witnesses? Did the jurors share a special anguish for the victim's family who were allowed to remain? These questions cannot be answered.

It is not contended that this case was a "Star Chamber" proceeding but a more subtle and insidious deprivation of a public trial. To allow the attendants of a criminal trial to be selected *sua sponte* by the trial judge deftly scalpels the term "public" to mean something quite different from public attendance. Stated otherwise, "[i]t is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can these classes be taken as the exclusive representatives of the public." *Davis v. United States*, 249 F. 394 (8th Cir. 1917).

This Court has recognized that the press has no constitutional access superior to those enjoyed by ordinary citizens. *Saxebe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974). *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d at 495 (1974). Nor can the press, as the alter ego of the citizenry, assure the purposes of the public trial guarantee and elevate a closed proceeding to the open judicial forum intended by the Framers of the Sixth Amendment.

By allowing the type of closure here, special attention is drawn to the witness. Those allowed to remain after exclusion could very well subvert the alleged purpose of the closure. Surely, the nervous or embarrassed witness is better protected and shielded by the public, many of whom would be friends of or in sympathy with the witness. On the other hand, an exclusion order limited to family could create a more hostile atmosphere depending upon the size and number of a defendant's family.

How is a court to determine who may remain and who must leave? Should attorneys not participating in the trial be excluded? Should law students be excluded?

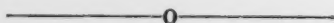
Should journalism students be excluded? Members of the legislature studying the judicial functions? How and on what basis can one draw a legal distinction between members of the public? A, B, and C may stay, but D may not? The perils of this type of closure become obvious.

Again it is clear that the Court of Appeals has mistakenly construed *Waller* to stand for the proposition that a trial can be elevated to public when selected few are allowed to remain.

The lower court incorrectly justifies the partial closure in this case by allowing the exclusion of the general public to protect the dignity of the witness. Protection of the witness from unnecessary insult to her dignity has no valid basis in law. Kindness and compassion are indeed worthy aims to all parties to a criminal trial. The witness was a mature woman with two children. *Douglas v. Wainwright*, *supra* at 1536. A multitude of criminal trials present embarrassing testimony on the part of witnesses. The mere fact that testimony *could be* embarrassing does not limit itself to this case. *Douglas v. Wainwright*, *supra* at 1537. If potential testimony could be embarrassing to a witness then public trials would soon be unusual and mere history. The trial court undoubtedly acted out of sympathy for the witness, an objective that could have been totally well motivated. However, a capital trial or any criminal trial does not have as its focal point the comfort and insulation of potentially embarrassing testimony at the sacrifice of an accused's constitutional rights. The exclusion, without reasoned inquiry of the witness and others, makes it impossible to determine whether manifest necessity required the parameters of closure in this case or a need for any closure. And even if this interest may

sometimes allow partial closure, the total absence of any reasoned findings prevents a founded justification for the deprivation of the Sixth Amendment guarantee.

The failure of the Court of Appeals to follow this Court's decisions is troublesome in the context of the Sixth Amendment. It creates uncertainty over the guidelines surrounding the closure of a criminal trial and raises the likelihood of erroneous decisions in future cases. The action of the Court of Appeals is inconsistent with the Sixth Amendment and would erode by attrition the right of a public trial.



CONCLUSION

This Court has continually applied the principle to openness of criminal proceedings. The Court previously granted the writ of certiorari because of the important Sixth Amendment questions presented by the closure in this case. The need to grant the writ again is manifest because if the judgment of the lower court is allowed to stand the right to a public trial is seriously threatened.

Respectfully submitted,

ELLIOTT C. METCALFE, JR.

LARRY HELM SPALDING

STEVEN M. GOLDSTEIN

Office of the Public Defender

2070 Main Street

Sarasota, Florida 33577

A-1

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5927

HOWARD VIRGIL LEE DOUGLAS,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of
Offender Rehabilitation, and DAVID H. BRIERTON, Su-
perintendent of Florida State Prison at Starke, Florida,

Respondents-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

(August 1, 1984)

Before RONEY and KRAVITCH, Circuit
Judges, and TUTTLE, Senior Circuit
Judge.

PER CURIAM:

The Supreme Court granted the petition for writ of cer-
tiorari in this case, vacating our judgment in *Douglas v.*
Wainwright, 714 F.2d 1532 (11th Cir. 1983), and remanded
for further consideration in light of *Waller v. Georgia*, 52
U.S.L.W. 4618 (May 21, 1984) and *Strickland v. Washing-*
ton, 52 U.S.L.W. 4565 (May 14, 1984). Because we find
that *Waller* and *Strickland* do not significantly change the
basis of our holding in *Douglas*, we continue to abide by
our prior decision.

I. THE PUBLIC TRIAL ISSUE

In *Douglas*, as did the Supreme Court in *Waller*, we looked to the Court's prior holdings on the first amendment right to attend criminal trials for guidance in deciding the scope of a defendant's sixth amendment right to a public trial. We identified several purposes of the public trial guarantee: allowing the public to see that a defendant is fairly dealt with, encouraging trial participants to perform their duties more conscientiously, discouraging perjury, and bringing forth witnesses who might not otherwise testify. 714 F.2d at 1541-42. The Court's opinion in *Waller* focused on basically on the same aims of the guarantee as those identified in *Douglas*. 52 U.S.L.W. at 4619-20.

Likewise, we find *Waller* and *Douglas* in agreement as to the stringent test that must be met for a complete closure to be justified. In *Douglas*, the panel relied on *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), in concluding that complete closure is "proscribed absent a most compelling justification," 714 F.2d at 1540, and that a court must hold a hearing and articulate specific findings before ordering either a total or partial closure, *id.* at 1545. The *Waller* Court articulated a very similar test:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

— U.S. at —, 104 S.Ct. at 2215 (quoting *Press-Enterprise Co. v. Superior Court*, — U.S. —, — —, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984)).

The Court further noted that the test articulated in *Waller* was in accord with its holding in *Globe Newspaper Co.*, the case relied upon by the panel in *Douglas*.

The different results in *Douglas* and *Waller* are thus not attributable to the application of differing legal standards, but to the application of the same legal standards to dissimilar facts. The most important distinguishing factor is that *Waller* involved a total closure, with only the parties, lawyers, witnesses, and court personnel present, the press and public specifically having been excluded, while *Douglas* entailed only a partial closure, as the press and family members of the defendant, witness, and decedent were all allowed to remain. Moreover, the closure in *Waller* was for the entire seven days of the suppression hearing although the playing of the disputed tapes lasted only two-and-one-half hours, whereas in *Douglas* the partial closure was limited to the one witness' testimony. *Douglas*, therefore, presented this Court with a fact situation different and unique from that faced by the *Waller* Court.

Because only a partial closure was involved in *Douglas*, we relied upon the binding precedent of *Aaron v. Capps*, 507 F.2d 685 (5th Cir. 1975),¹ which had held that where a partial closure is involved, a court must look to the particular circumstances to see if the defendant still received the safeguards of the public trial guarantee. *Id.* at 688. In *Aaron*, the court held that no constitutional viola-

¹ The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

tion had occurred because, *inter alia*, members of the press and the defendant's relatives and clergymen were present at the trial. As in *Aaron*, the *Douglas* panel found that the impact of the closure was "not a kind presented when a proceeding is totally closed to the public, 714 F.2d at 1544, and therefore only a "substantial" rather than "compelling" reason for the closure was necessary. *Id.* The panel further found that a substantial reason—protection of the witness from unnecessary insult to her dignity—existed that justified the partial closure. *Id.* at 1544-45.

Douglas thus involved an application of the general sixth amendment public trial guarantee to the specific situation of a partial closure, a situation not addressed in *Waller*. We do not read *Waller* as disapproving of *Aaron's* adaptation of the general standards governing closures, standards on which *Douglas* and *Waller* are in accord,² to a case where only a partial closure is involved and at least some access by the public is retained. Consequently, we reaffirm the denial of habeas relief on the public trial issue.

² As did the *Waller* court, the *Douglas* panel found that "an opportunity to be heard and adequate findings are required where any closure of the trial is contemplated and the defendant objects and requests an opportunity to be heard." 714 F.2d at 1546. See Also *Waller*, 52 U.S.L.W. at 4619. The defendant in *Douglas*, however, had failed to specifically object to the absence of a hearing or findings, resulting in procedural default. 714 F.2d at 1546; see also *Wainwright v. Sykes*, 433 U.S. 72 (1977).

II. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The Court also remanded for further consideration in light of its holding in *Strickland v. Washington*, 52 U.S.L.W. 4565 (May 14, 1984). In the panel opinion we held that counsel's performance at the penalty phase constituted ineffective assistance warranting habeas relief.

In *Washington*, the Court identified two components of a general ineffective assistance of counsel claim: the defendant must demonstrate (1) that counsel's performance "fell below an objective standard of reasonableness," *id.* at 4570, and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 4572. Moreover, the defendant must satisfy both the performance and prejudice prongs to be entitled to relief. *Id.* at 4573.

In the panel opinion, we found that defense counsel's performance had fallen below a standard of reasonableness; indeed, we observed that "counsel's ineffectiveness cries out from a reading of the transcript." 714 F.2d at 1557. The first prong of the *Washington* test was thus satisfied in *Douglas*.

As to the prejudice prong, we noted in our opinion that *Washington* was before the Supreme Court and that the circuits were in conflict as to what standard of prejudice was to be used. We further explained, however, that we did not need to withhold our decision until the Supreme Court decided *Washington*, because "under virtually any standard, prejudice is evident on the face of the record." *Id.* Later in the opinion, we expressly stated that counsel's ineffectiveness created a "great 'likelihood

that counsel's inadequacy affected the outcome of the trial,'” *Id.* at 1558, thus satisfying a standard even more strict than *Washington's* “reasonable probability” standard, see 52 U.S.L.W. at 4572. We therefore reaffirm our original holding that the district court erred in denying habeas corpus relief on the ineffective assistance of counsel claim.

For the foregoing reasons the panel opinion is reinstated.

No. 81-5927—*Douglas v. Wainwright*

RONEY, Circuit Judge, dissenting

I dissent for the reasons set forth in my dissent to the original panel opinion. *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983).



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NO. 84-661
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

HOWARD VIRGIL LEE DOUGLAS
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Respondents.

On Cross-Petition for a Writ
of Certiorari to the United
States Court of Appeals for
the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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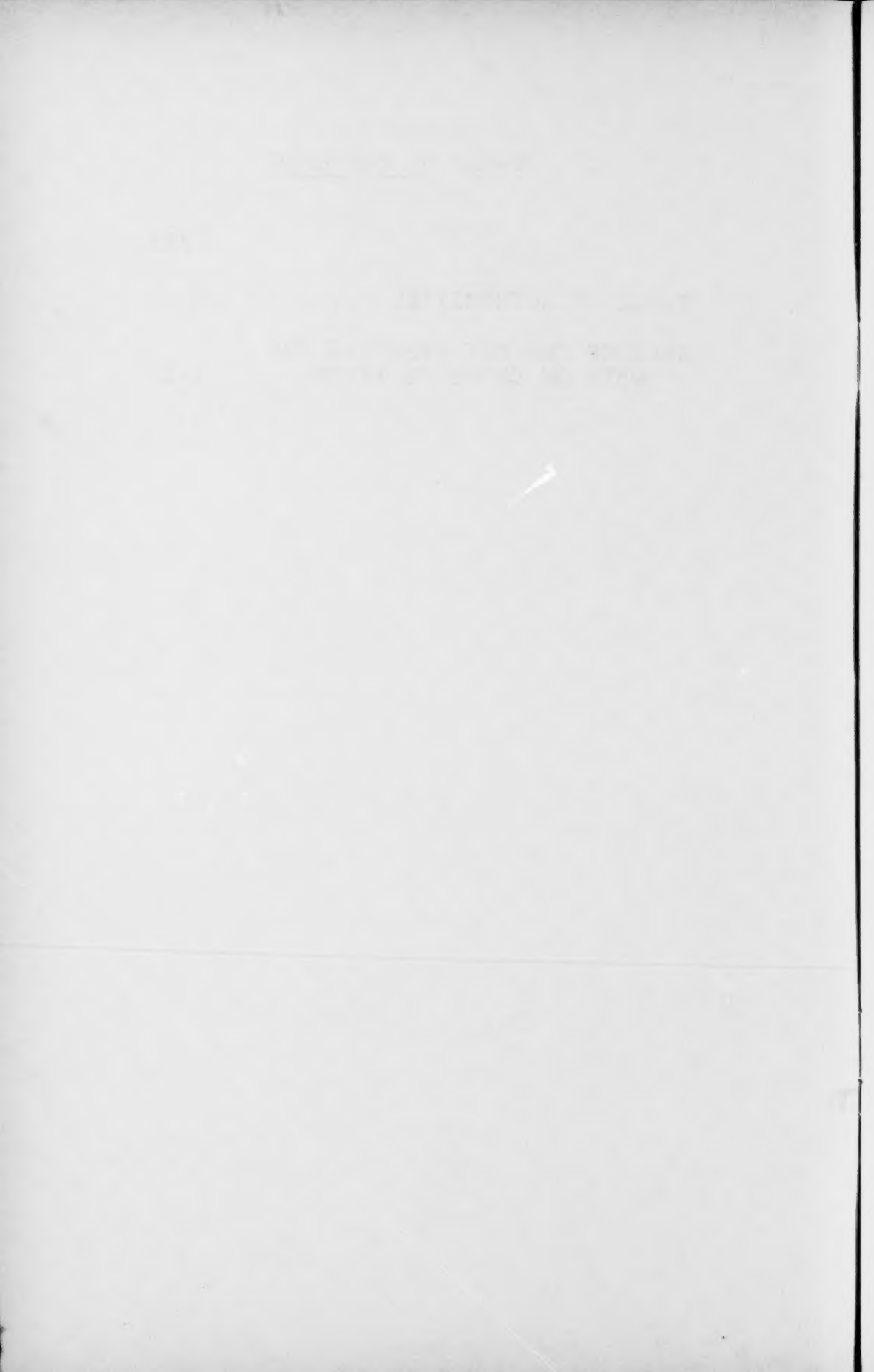


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I

REASONS FOR NOT GRANTING
THE WRIT ON CROSS-PETITION

In Waller v. Georgia, ___ U.S. ___,
104 S.Ct. 2210 (1984), it was held that
the Sixth Amendment right to a public
trial, while significant and weighty, may,
in certain cases, yield to governmental
interests provided that certain strict
requirements are met. Any closure of any
part of a criminal trial must meet the
tests set forth in Press-Enterprise
Company v. Superior Court, ___ U.S. ___,
104 S.Ct. 819 (1984). The components
of the Press-Enterprise formula include
the requirements that the party seeking
to close the proceeding must advance an
overriding interest that is likely to
be prejudiced, the closure must be no
broader than necessary to protect that
interest, the trial court must consider
reasonable alternatives to closing the

proceeding and it must make findings adequate to support the closure.

In Waller, the reason advanced by the prosecution for closing an entire suppression hearing was that the publication of any information obtained under the wiretap that was not necessarily essential would render the information inadmissible under Georgia law. Some of the evidence would involve persons who were either indicted but not then on trial, or who were not indicted at all. Thus, any evidence against those people might be tainted. The suppression hearing which was closed lasted seven days and only two-and-one-half hours of the entire hearing were devoted to the playing of the tapes in question. Apparently contrary to the representations of the prosecution, only a few of the tapes either mentioned or involved parties that were not then before the court.

This Court considered the closure to be plainly unjustified because the reasons advanced were not specific enough as to whose particular privacy interests might be infringed, what portions of the tapes might infringe them, and what portions of the evidence consisted of the tapes. As a consequence, the findings for closure were both broad and general and did not even purport to justify the closure of an entire seven-day hearing. No alternatives were considered and indeed, the only relevant finding of the trial court was one based apparently on the interest of those future defendants not then on trial. Most importantly, the closure was ordered with little or no consideration for the defendant's Sixth Amendment right.

Here, in its opinion on remand, the court of appeals reiterated its awareness of the principles behind all relevant

decisions of this Court on the subject, and determined that Waller left the original judgment unaffected, basing its judgment on a significant dissimilarity of facts. That judgment is both supportable and proper.

In this case, the interests advanced for closure were the protection of the witness from embarrassment and the protection of the public morality. Douglas v. Wainwright, 714 F.2d 1532, 1545 (11th Cir. 1983). (The court of appeals focused on the protection of the witness of embarrassment as not only the primary but also the proper basis for closure). In light of the circumstances and the motivation for the motion of the prosecution, these reasons were both specific and identifiable. It is obvious that the closure was no broader than necessary to protect the particular interest advanced since it took place during the testimony

of but one witness. The entire proceeding was not closed. Also, the matter testified to during the "closed" portion of the proceedings was precisely related to the reasons advanced for closing the proceedings in the first place.

That leaves the remaining two Waller considerations as the only possible areas of concern. With regards to the alternative to limited closure, we suggest that this particular test is either not applicable to the facts in this case or if applicable, not to the same extent as to the facts appearing in Waller. There, emphasis was placed on this component because the proffered reasons for closure were speculative at best, and to a certain degree, unfulfilled. At any rate, they were legally insufficient to justify closure of the entire hearing. We can think of no alternative to the instant limited closure considering the

facts and circumstances of this case. If an alternative was available, it appears to have been utilized, insofar as instead of closing the proceedings to all people, the trial court allowed families of both the victim and the defendant to be present as well as court personnel and the press. We interpret the alternative requirement of Waller as one based in large measure upon reasonableness. The conditions of closure here were surely reasonable.

Unlike the trial court proceedings in Waller, the record here makes sufficient showing as to the findings in support of the closure. There can be no doubt that the trial court granted the motion for limited closure based only on the reasons advanced and with full knowledge and recognition of Douglas' constitution right to a public trial. 714 F.2d at 1537; (TR-215).

Further distinguishing facts are present in this case. In Waller, this Court seemed unimpressed with the potential for tainted evidence expressed initially by the prosecutor, noting that only a few of the tapes mentioned or involved parties not then before the court. In contrast, the prosecutor in this case knew full well what Helen Atkins was going to say, and his expectations proved most accurate. Also, it would appear that the testimony Helen Atkins gave in a "closed" courtroom turned out to be something which Douglas agreed should not be aired in "total public" since at no time during or after her testimony did he renew any objection, or offer the suggestion that the testimony be repeated in an open court. The significance of this becomes larger when one remembers that direct examination and cross-examination of Helen Atkins was interrupted so that two

other witnesses could testify as a matter of convenience. Court was then recessed overnight. Upon reconvening the next day, Helen Atkins was once again on the stand. (TR-331) We emphasize this since there was more than ample opportunity to object to the limited closure, or, as stated previously, at least suggest that the closure was not justified after all, and that the witness should have been required to re-testify in a totally open court. This failure to object or otherwise move for relief was underscored by the court of appeals in the panel opinion. 714 F.2d at 1546. The possible reason for failing to object could have been the belief of Douglas that after hearing the testimony of Helen Atkins, it was indeed something which did not need to be heard by the general public.

Just as it was determined that the particular facts and circumstances

present in Waller did not justify the closing of an entire hearing, it follows that the particular facts and circumstances in this case did justify the partial and limited closure of only part of the entire proceeding. The respective judgments of the court of appeals, the federal district court, the Florida Supreme Court, and the trial court, was that Douglas' right to a Sixth Amendment public trial was not violated in this case. Importantly, no court which has previously reviewed this case has even attempted to suggest that any part of any criminal trial may be closed merely by the request of the prosecution or any other party; and no rule of law has issued which would offer support for such a request in the future. Based on these facts and these facts alone, the decision in Waller does not require a contrary finding. We contend that the

analysis and resolution of the public trial issue in the panel opinion and in the opinion on remand was correct. The court of appeals, as well as all courts below, correctly balanced the right to a Sixth Amendment public trial with the reasons advanced for closing a part of that trial. We therefore request that the cross-petition for writ of certiorari be denied.

Respectfully submitted on this

_____ day of November, 1984.

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